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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

MAY 15 1996

In the Matter of	)	
	)	
Implementation of Sections of the	)	MM Docket No. 92-266/
Cable Television Consumer Protection	)	CS Docket No. 96-60
and Competition Act of 1992:	)	
Rate Regulation	)	
Leased Commercial Access	)	

**COMMENTS OF THE ASSOCIATION OF  
AMERICA'S PUBLIC TELEVISION STATIONS AND  
THE PUBLIC BROADCASTING SERVICE**

The Association of America's Public Television Stations ("APTS") and the Public Broadcasting Service ("PBS") (collectively "public television") submit these comments in response to the Commission's Notice of Proposed Rulemaking in MM Docket No. 92-266 and CS Docket No. 96-60 ("Notice"). The Notice seeks comment on the Commission's proposed revisions to its channel reservation and rate structure requirements of its cable leased access rules. Specifically, APTS and PBS are responding to the Commission's request for comments on whether cable operators should be required to reserve a portion of their leased access channel capacity for nonprofit programmers at preferential rates.

**I. Introduction and Summary of Position**

APTS and PBS are nonprofit organizations whose membership includes nearly all of the nation's 179 public television licensees. APTS represents its members in legislative and policy matters before the Commission, Congress, and the Executive Branch, as well as engaging in

planning and research activities on behalf of the stations. PBS provides program distribution and other services to the stations and is a leader in the development of new and improved television technologies.

In order to provide public television the ability to lease cable channels, it is essential that the Commission include in its cable leased access regulations the requirements that: (1) cable operators must reserve leased access capacity for public telecommunications entities,<sup>1</sup> and (2) cable operators must afford access to this reserved capacity at preferential rates. Reservation of leased access channels at preferential rates is the only way to provide for nonprofit educational use of these cable channels.

## **II. Assuring Access to Leased Channels For Public Telecommunications Entities is Consistent with Congressional and Commission Policies**

While most Americans are familiar with the primary, over-the-air public broadcast programming offered by noncommercial educational television stations, many are not aware of the wealth of additional educational services that these stations provide to their communities. Public television provides instructional services that serve a multitude of needs and reach into millions of classrooms, workplaces and homes. Some public television stations have available state or regional funded satellite systems, microwave and ITFS systems, cable television, and telephone lines to deliver these additional educational and community services to schools, libraries, hospitals, prisons, daycare centers, and state and local agencies.

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<sup>1</sup> "Public telecommunications entity," as defined in Section 397 (12) of the Act, includes "public broadcast station[s] or noncommercial television communications entit[ies]" that disseminate "non-commercial educational and cultural radio and television programs, and related noncommercial instructional or informational material that may be transmitted by means of electronic communications." 47 U.S.C. §§ 397 (12) and (14).

Unfortunately, these distribution technologies are unavailable or unaffordable for many public television licensees. The availability of leased channels at affordable rates would offer public television stations more opportunities to distribute the wide range of additional educational and community service programming and related services available to public television.<sup>2</sup>

**A.        Reserving Capacity and Setting Preferential Rates for Non-Profit Programmers is Consistent with the Goals of the 1984 and 1992 Cable Acts Establishing Leased Access**

The leased access provision, first adopted in the 1984 Cable Act, was designed to “assure that the widest possible diversity of information sources are made available to the public.”<sup>3</sup> To further this goal, Congress made clear that it intended that nonprofit programmers be charged a lower rate for use of the leased commercial access channels:

[Section 612] does contemplate permitting the cable operator to establish rates, terms and conditions which are discriminatory ... Non-discriminatory access requirements could well undermine diversity goals. ... Thus, by establishing one rate for all leased access

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<sup>2</sup> These additional educational and community programming services offered by public television stations are distinguished from the stations’ primary, over-the-air signals, which are carried pursuant to the must-carry law. APTS and PBS must emphasize that granting leased access for educational programmers cannot possibly replace the must carry requirements applicable to public broadcast stations for their primary signals. The constitutionality of the must-carry provisions was addressed in Turner Broadcasting System, Inc. v. FCC, 114 S. Ct. 2445 (1994), in which the Supreme Court determined that must carry is a content-neutral restriction and should be sustained if it furthers important governmental interests without burdening speech more than is necessary to further those interests. The Court confirmed that the reasons Congress articulated for the must-carry provisions are important governmental interests, but remanded the case to the district court to hold further evidentiary proceedings to determine whether the must-carry provisions will in fact advance those governmental interests. The district court, in a 2-1 decision found that there was substantial evidence upon which Congress could base a reasonable determination that must carry advanced important governmental interest. That decision is now on appeal in the Supreme Court.

<sup>3</sup> Cable Communications Act of 1984, 47 U.S.C. § 532, at § 612(a).

users, a price might be set which would render it impossible for certain classes of cable services, such as those offered by not-for-profit entities, to have any reasonable expectation of obtaining leased access to a cable system.<sup>4</sup>

In the 1992 Cable Act, Congress transferred the responsibility from the cable operators to the FCC to determine maximum reasonable rates, terms and conditions for use of the commercial leased access channels.<sup>5</sup> The Act also added, as a second purpose for the leased access provisions, “to promote competition in the delivery of diverse sources of video programming.”<sup>6</sup> Thus, the transferred rate-setting responsibility carries with it the same authority set forth in the 1984 Act, to set rates, terms and conditions to facilitate access to the cable system by nonprofit programmers.

Making leased access channels available to public telecommunications entities on a reserved, preferential rate basis will further the dual purposes of the leased access provisions of the 1984 and 1992 Cable Acts: to help assure the widest possible diversity of information services to the public and to promote competition in the delivery of diverse sources of video programming.<sup>7</sup>

**B. Long-standing, National Policy Favors Reservation of Leased Access Channels and Preferential Rates to Facilitate Access for Public Telecommunications Services**

The nation’s public telecommunications entities represent the only locally controlled programming services in the United States whose sole

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<sup>4</sup> H.R. Rep. No. 934, 98th Cong., 2d Sess. 51 (1984).

<sup>5</sup> 1992 Cable Act § 9(b), 47 U.S.C. § 532(b), amending § 612 of the 1984 Cable Act.

<sup>6</sup> *Id.* at § 9, 47 U.S.C. § 532

<sup>7</sup> 1984 Cable Act § 612(a); 1992 Cable Act § 9(a).

purpose is to distribute educational, informational, cultural and instructional programming at the community level. Congress and the Commission have long recognized the public interest benefits of public telecommunications services and have adopted a policy of ensuring that all citizens have access to public telecommunications programming. Reservation of a portion of the leased capacity specifically for public telecommunications entities is consistent with these long standing access policies of Congress and the Commission.

In 1967, in the Public Broadcasting Act, Congress amended the Communications Act to provide that "it is necessary and appropriate for the Federal Government to complement, assist and support a national policy that will most effectively make noncommercial educational radio and television service available to all citizens of the United States."<sup>8</sup> In furtherance of this policy, Congress made it explicit that public telecommunications entities may receive preferential access to common carrier transmission facilities. The Public Broadcasting Act of 1967 added Section 396(h) of the Communications Act, which provides that "[n]othing in [the Communications Act], or in any other provision of law, shall be construed to prevent United States communications common carriers from rendering free or reduced rate communications interconnection services for public television or radio services[.]" 47 U.S.C. § 396(h)(1).<sup>9</sup>

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<sup>8</sup> The Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 365 (codified at 47 U.S.C. §396(a)(7) (1988 & Supp. IV 1992)).

<sup>9</sup> As new technologies for transmitting video programming to consumers have developed, Congress has repeatedly responded to ensure that educational public telecommunications services will be available to the public on these emerging technologies. In 1978, Congress amended the Communications Act to assure access to broadcast and nonbroadcast technologies. The Public Telecommunications Financing Act of 1978, Pub. L. No., 95-567, 92 Stat. 2405 (codified at 47 U.S.C. §390 (1988)). This policy was reiterated in the Public Telecommunications Act of 1992, which amended the Communications Act "to ensure that all citizens of the United States have access to public telecommunications services through all appropriate available telecommunications

The Commission also has long recognized the unique needs of public telecommunications entities and has adopted policies to ensure public access to such services. In its original reservation in 1952, the Commission reserved 242 channels on the Ultra High Frequency ("UHF") spectrum for educational television.<sup>10</sup> More recently, in 1992, the Commission committed to carry over this channel reservation policy in its allotment of advanced television channels to broadcasters.<sup>11</sup> In applying this policy, the Commission acknowledged "the important role noncommercial educational stations play in providing quality programming to the public and financial constraints they face in building and running their stations."<sup>12</sup>

### **III. Public Telecommunications Entities Must Be Assured Preferential Rates for Leased Access Channels To Allow the Use of These Channels**

APTS and PBS support revising the leased access rate structure to include preferential rates for nonprofit programmers. Paying commercial rates for the capacity to distribute educational services is not an option for most public television stations. First, public broadcasters, in line with Congress' mandates, are firmly committed to the widest possible dissemination of educational services at the lowest possible cost.<sup>13</sup> Commercial video information providers recoup the costs of developing and

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distribution technologies." The Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106 Stat. 949 (codified at 47 U.S.C.A. §396(a)(9)(1994)).

<sup>10</sup> Television Assignments, Sixth Report and Order, 41 F.C.C. 18, 148 (1952).

<sup>11</sup> Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Second Report and Order/Further Notice of Proposed Rulemaking, F.C.C. Rcd. 3340, 3350, ¶¶ 36-37 (1992); Memorandum and Opinion and Order/Third Report and Order/Third Further Notice of Proposed Rulemaking, 7 F.C.C. Rcd. 6924, 6950-51, ¶¶ 33-34 (1992).

<sup>12</sup> Second Report and Order, 7 F.C.C. Rcd. at 3350, ¶ 36.

<sup>13</sup> See 47 U.S.C. § 396(a)(7) and (a)(9).

disseminating services through subscription fees, pay-per-view billing mechanisms or commercial advertisements. None of these are options for public television.

Moreover, public television's educational services simply cannot be fully supported by users. The long-standing federal policy of facilitating access to public telecommunications services is premised on the fundamental principle that the marketplace cannot support the development and dissemination of certain educational and cultural services. Over the years, Congress has recognized that "the economic realities of commercial broadcasting do not permit widespread commercial production and distribution of educational and cultural programs which do not have a mass audience appeal."<sup>14</sup> Public television's "original mandate" is to serve as "an educational, innovative and experimental alternative to commercial broadcasting."<sup>15</sup> Thus, public television licensees, in line with Congress' direction, fill voids left by the commercial marketplace.

Further, public broadcasting's scarce resources, obtained through combinations of federal and state funding, underwriting, and viewer contributions, are already stretched to maintain basic public broadcasting services. Given public broadcasting's scarce resources, the costs of accessing a distribution technology for transmission of additional educational services often puts the technology out of reach. In sum, if the Commission decides to permit nonprofit programmers access to cable leased channels based on marketplace rates, it will restrict the public's access to public telecommunications services.

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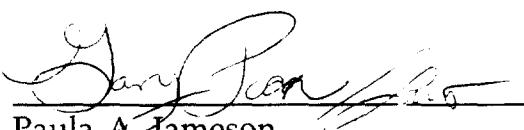
<sup>14</sup> H.R. Rep. No. 572, 90th Cong., 1st Sess. 1 (1967).

<sup>15</sup> H.R. Rep. No. 825, 100th Cong., 2d Sess. 10 (1988).

APTS and PBS support an incremental cost based rate structure for nonprofit programmers' access to leased channels. An incremental cost based rate is defined as the lowest rate consistent with the long run incremental cost or out-of-pocket cost, whichever is lower, of the cable operator in providing the leased access channels. This rate should be no more than the directly attributable cost of these channels, and in no event should it contain a contribution to cover the joint or common costs of the provider. By using incremental cost based rates, the Commission will provide meaningful access for noncommercial educational program services and, at the same time, ensure that cable operators are not adversely affected financially by the proposed preferential rates.

### Conclusion

Reserving channel capacity and establishing incremental cost based rates for nonprofit programmers' use of the leased access cable channels would achieve the important policy goal of fostering diversity of program sources on the leased access channels, including the programming services of public telecommunications entities.

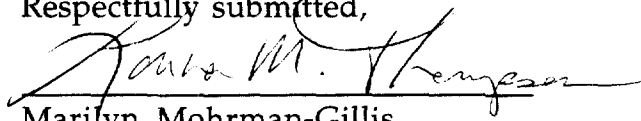


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